No. 157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, *Petitioners*,

vs.

THE FEDERAL POWER COMMISSION, *Respondent*, MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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vs.

THE FEDERAL POWER COMMISSION, *Respondent*,
MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 15, 1956, which affirmed an order of the Federal Power Commission permitting the intervenor, Montana-Dakota Utilities Company, to withdraw and cancel its common-carrier tariffs for the transportation of natural gas through its pipelines built in part upon and passing through the public domain.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 43-49) is not yet officially reported. The decision, findings and conclusions, and order of the Federal Power Commission's Presiding Examiner are set forth in the Record at pages 14-26, and the order of the Federal Power Commission affirming the decision of the Presiding Examiner is set forth in the Record at page 34.

JURISDICTION

The judgment of the Court of Appeals (R. 50), affirming the order of the Federal Power Commission (R. 34) was entered on March 15, 1956. The Court of Appeals had jurisdiction of the cause under the provisions of Section 19 of the Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717(r). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Section 28 of the Mineral Leasing Act of 1920 authorized the Secretary of the Interior to grant rights-of-way through the public lands for pipe-line purposes for the transportation of natural gas upon the express condition, among others, that "such pipelines shall be constructed, operated and maintained as common-carriers * * *." On August 12, 1953 the said section 28 was amended so that the common-carrier provisions "shall not apply to any natural gas pipeline operated by any persons subject to regulation under the Natural Gas Act * * *." The question presented is whether the amendment of August 12, 1953 is applicable to a pipe line which was a common-carrier under a right-of-way granted pursuant to Section 28 of the Mineral Leasing Act of 1920 prior to the amend-

ment of 1953, or whether the amendment is applicable only to rights-of-way to be granted by the Secretary after the amendment.

STATUTES INVOLVED

1. Section 28 of the Mineral Leasing Act of 1920, as amended, 41 Stat. 449, 49 Stat. 678, 30 U. S. C. 185, prior to the amendment of August 12, 1953, provided in pertinent part as follows:

> "Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in Section 181 of this title, to the extent of the ground occupied by the said pipe line, and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers, and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing, with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable, provided * * *."

2. The amendment of August 12, 1953, 67 Stat. 557, added at the end of the quoted portion of Section 28 of the Mineral Lands Leasing Act, above, the following:

> "That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal

regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: * * *."

STATEMENT

Intervenor, Montana-Dakota Utilities Company, (hereinafter referred to as "Montana-Dakota") operates an integrated natural gas pipe line system in the States of Wyoming, Montana, North Dakota and South Dakota. It produces, purchases, transports and sells natural gas in interstate commerce for resale and is a natural gas company within the meaning of the Natural Gas Act. The system is constructed in part over public lands. The principal lines in Montana, North Dakota and South Dakota were built under rights-of-way granted by the Secretary of the Interior upon the condition that the lines be operated as a common-carrier within the meaning of the provisions of section 28 of the Mineral Leasing Act.[1]

The order of the Federal Power Commission, which was affirmed by the court below, grew out of a series of complaints and applications which were consolidated for hearing before the Commission's Presiding Examiner (R. 16). Prior to the time these proceedings were instituted before the Commission,

[1] The foregoing paragraph is part of the third paragraph of the Counterstatement of the Case at page 2 of the Joint Brief of Respondent and Intervenor in the court below. The entire third paragraph has been stipulated as correct (R. 13). The remainder of the paragraph is as follows: "The line from Worland, Wyoming to Baker, Montana, was built prior to the effective date of the August 12, 1953 amendment to the Mineral Leasing Act, but no right-of-way instrument was executed prior to the amendment by the Secretary of the Interior since there was dispute as to the exact terms to be incorporated in the right-of-way instrument."

Montana-Dakota had been required to file and publish a tariff for the transportation of natural gas as a common-carrier (R. 15).[2] And petitioner Mondakota and Industrial Gas Company had services agreements with Montana-Dakota under its common carrier tariff (R. 2, 15, 45).

The proceedings before the Federal Power Commission, which were consolidated for hearing, may be briefly summarized as follows:

The first application before the Federal Power Commission was instituted by intervenor Montana-Dakota on July 23, 1953 seeking an order authorizing it to abandon common-carrier transportation of natural gas where the shipper, in the absence of satisfactory credit arrangements, had not provided bond required by the tariff (R. 14-15). On May 27, 1954, intervenor Montana-Dakota filed an application for authority to suspend common-carrier transportation services for alleged non-payment of past services rendered by it to Industrial Gas Co. Responses to this application were filed by Mondakota and Industrial stating that the charges had been paid (R. 15). Another similar petition was filed on October 1, 1954 (R. 16). On June 24, 1954, intervenor Montana-Dakota filed a proposed revised tariff providing contract-carrier service in lieu of common-carrier service. The Commission

[2] Mondakota Development Company, predecessor of petitioner Mondakota Gas Company (hereinafter referred to as "Mondakota"), a producer and shipper of natural gas, had instituted proceedings in 1941 to secure the publication of a common-carrier tariff by Montana-Dakota, a result which was finally achieved by the decision in *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. (2d 392 (C.A. 8) cert. den. 335 U.S. 853. That decision details the history of Montana-Dakota's refusal to comply with the provisions of the Mineral Leasing Act.

suspended the proposed tariff and provided for a hearing (R. 15).

On July 2, 1954, Industrial Gas Co. and petitioner Mondakota filed a joint application for a determination of the reasonableness of intervenor's original gas common-carrier tariff (R. 15-16). On September 7, 1954, intervenor filed a complaint against Industrial Gas Co. and petitioner Mondakota and others claiming that the operations of the named defendants, with respect to natural gas transportation through the pipe lines of intervenor, were in violation of Section 7(c) of the Natural Gas Act. 15 U. S. C. 717(f). Answers to this charge were filed by Mondakota and Industrial and others (R. 16).

Finally, on October 1, 1954, petitioner Mondakota filed an application for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act (15 U. S. C. 717(f)), authorizing it to sell natural gas to Eastern Clay Products Co. (R. 15).

By orders issued on November 15 and December 3, 1954 all of the complaints and applications were consolidated for hearing to commence on December 7, 1954 (R. 17). Mondakota and Industrial requested a postponement of the hearing on the ground that the time allowed was insufficient to prepare adequately for issues so complex and of such far reaching importance (R. 6, 17). The motions were denied (R. 6, 17) and hearings were held on December 7 and 8, 1954 (R. 6).

On the second day of the hearings, and without prior notice, Montana-Dakota moved orally that all their tariffs "relating to common carriage as well as con-

tract carriage be entirely and in all respects withdrawn and removed from the files and cancelled" (R. 20). At the conclusion of the hearing on December 8, 1954, petitioner Mondakota filed a motion for adjournment and on January 7, 1955 it filed a petition for reopening the record for further hearing. These were denied by the Examiner because "the issues presented are legal in nature and no useful purpose could be served by reopening the record for further proof" (R. 17).

On February 1, 1955, the Presiding Examiner rendered his decision (R. 14-26). Among other things he concluded "that the obligations of Montana-Dakota as a common-carrier of natural gas under the Mineral Leasing Act are terminated by the aforesaid amendment of August 12, 1953" (R. 20) and he granted Mondakota's oral motion made at the hearings above referred to (R. 24-25).[3]

Exceptions were taken to the Examiner's decision (R. 26-33), but by order dated March 16, 1955, the Commission affirmed the decision of the Presiding Examiner (R. 34). A timely petition for rehearing (R. 34-41) was denied on April 27, 1955 (R. 42).

A petition for review was filed by petitioner in the court below on June 24, 1955 (R. 2-11). By stipulation of all parties, approved by the court below (R. 11-13), it was agreed that the issues in the court below were (1) "Whether petitioners are aggrieved by the order of the Federal Power Commission herein, within the meaning of Section 19(b) of the Natural Gas Act * * * and Section 10 of the Administrative Procedure Act * * * and (2) "Whether the Act of August 12,

[3] In addition, all the other proceedings were either dismissed or terminated. (R. 25).

1953 * * * amending Section 28 of the Mineral Leasing Act * * * applied to pipelines operated by Montana-Dakota Utilities Co., a natural gas company subject to regulation under the Natural Gas Act, which pipelines were constructed prior to August 12, 1953, over the public domain under rights-of-way granted by the Secretary of the Interior (except that the pipe line from Worland, Wyoming, to Cabin Creek Compressor Station in Montana, although constructed prior to August 12, 1953, is on rights-of-way issued by the Secretary of the Interior subsequent to the passage of said Act)."

The court below concluded that petitioner "Mondakota has a sufficient interest to obtain review" and found it "unnecessary to consider the status of the other petitioners" (R. 46). On the merits, it concluded (R. 46-49) that the Act of August 12, 1953, amending Section 28 of the Mineral Leasing Act, applied to pipelines which were, at the time of the amendment, already subject to the common-carrier provisions of Section 28, and, accordingly, it affirmed the Commission's order (R. 50).

REASONS FOR GRANTING THE WRIT

The court below, in deciding that the amendment of August 12, 1953, 67 Stat. 557, served to relieve natural gas pipe lines from the common-carrier obligations which had initially been imposed upon them as conditions to the granting of their rights-of-way through the public lands, has decided an important question of federal law which has not been, but should be, settled by this Court. The question is important because in the western section of our country an interstate pipe line necessarily passes through public lands,

and by the decision below all of such pipe lines have been relieved of their former obligations to transport gas for others as common-carriers. The decision of the court below, if it is not reversed by this Court, will result in the loss of substantial investments of petitioner Mondakota, and of others similarly situated, in gas wells, gathering lines, compressor plants, and contracts. It will deprive producers and shippers of competitive markets for their gas. In addition, those who purchased gas from petitioner Mondakota will now be deprived of the right to purchase gas at competitive prices. On what seems to petitioners to be most doubtful legal grounds, the decision below has rendered ineffective over 20 years of effort on the part of the petitioner Mondakota, its predecessors and principal officers, to establish competitive prices for natural gas.

The court below was in error in its interpretation of the amendment of August 12, 1953. In rejecting petitioners' argument that the amendment applied only to natural gas pipelines granted rights-of-way after August 12, 1953, the court below stated (R. 47-48):

> The 1953 amendment provides that pipe lines otherwise bound by the common-carrier provisions shall be exempt where they are operated by persons subject to specified public regulation. The exemption rests upon operation. According to the terms of the amendment, if the operation of the pipe line is subject to the regulation specified in the amendment, the common-carrier provisions do not apply. The amendment makes no reference to conditions in grants of rights-of-way; it refers directly to operation. It speaks in the present, referring to present operation. If Congress had meant its exemption proviso to apply only to

> carriers thereafter securing rights-of-way, we think it would have cast its enactment in a different mold. It would have referred to conditions in grants.

The above quotation from the opinion of the court below highlights its error. The fact is that the Congress did precisely what the court below said it would have done if it had intended the exemption proviso to apply only to carriers thereafter securing rights-of-way. The Congress, in enacting the amendment of August 12, 1953, did not merely provide after the enacting clause that the common-carrier provisions of section 28 of the Mineral Leasing Act should not apply to any natural gas pipe line operated by a regulated person. If it had done so, the court below might have been correct. Instead, the Congress, in the amendment of August 12, 1953, provided that section 28 of the Mineral Leasing Act "is amended by inserting after 'Provided,' the following:", incorporating the exemption as an actual part of section 28. The amendment of August 12, 1953 does not exist independently; it is now an integral part of section 28. That section, as now amended, provides, in pertinent part, as follows:

> Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of * * * natural gas * * * under such regulations * * * as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers * * * Provided, that the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act * * *."

When the exemption proviso of the August 12, 1953 amendment is read as part of section 28, as the Congress expressly provided it should, it is abundantly clear that the entire section applies to future grants of rights-of-way. Contrary to what the court below stated (R. 47) the amendment *does* make reference to conditions in grants of rights-of-way, because it sets forth the circumstances under which the common-carrier conditions, referred to earlier in the section, will not be required. The entire section 28, as it now reads, merely sets forth the powers and limitations of the Secretary of the Interior in granting future rights-of-way through the public lands for natural gas pipe lines.

We think that our interpretation of the amendment of August 12, 1953 is the only permissible one. Any other view retroactively destroys valuable rights of petitioner Mondakota and relieves Montana-Dakota of pre-existing obligations. Such a retroactive interpretation is not to be chosen unless the words in the statute are so clear, strong, and imperative that no other meaning can be annexed to them. *United States* v. *Heth*, 3 Cranch 399, 413; see also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co.*, 266 U. S. 435; *Schwab* v. *Doyle*, 258 U. S. 529.[4] Not only does the language of the amendment not clearly evidence an intent to relieve pipe lines which were previously "constructed, operated and maintained" (30 U. S. C. 185) as common-carriers from their obligations as such carriers, but the amendment, when

[4] The court below was of the opinion that its interpretation did not render the amendment retroactive (R. 48). To be sure, the amendment applies to present and future operation, but what the court overlooked was that its interpretation in 1955 wiped out rights obtained, and obligations incurred, many years before.

incorporated into section 28, as Congress expressly declared it should be, can be read only as removing a limitation on the Secretary of Interior's authority in granting new rights-of-way through the public lands in the future.[5]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted

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[5] We think the language is so clear that resort to the legislative history is unwarranted. *Ex Parte Collett*, 337 U.S. 55, 61; *Gemsco* v. *Walling*, 324 U. S. 244, 260. But, in any event, the Committee and Conference Reports on the bill (H. Rep. 764, S. Rep. 578, H. Rep. 1032, 83rd Cong., 1st Sess.) in no sense require the conclusion of the court below. Nowhere do they state that the purpose of the amendment was to exempt pipe lines which already were obligated to perform common-carrier services. The purpose to "relieve" pipe lines (R. 48) of the common-carrier obligations is at best ambiguous and suggests a prospective application only, just as well as an application to existing common-carriers. Indeed, the Senate Report (S. Rep. 578, 83rd Cong., 1st Sess.) indicates a future application only when it states "The purpose of this proposed legislation is to amend section 28 of the act of February 25, 1920 * * * to permit companies subject to regulation under the Natural Gas Act * * * *to cross* United States Government land without incurring the obligation *to become* a common carrier." (Italics supplied).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12759

MONDAKOTA GAS COMPANY, a Corporation, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*

On Petition for Review of an Order of the Federal Power Commission

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Decided March 15, 1956

Mr. Leif Erickson, of the bar of the Supreme Court of Montana, *pro hac vice*, by special leave of Court, with whom *Mr. James R. Browning* was on the brief, for petitioners. *Mr. Ellis Lyons* also entered an appearance for petitioners.

Mr. William J. Grove, Assistant General Counsel, Federal Power Commission, with whom *Mr. Willard W. Gatchell*, General Counsel, Federal Power Commission, and *Mr. Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. Armin M. Johnson, of the bar of the Supreme Court of Minnesota, *pro hac vice*, by special leave of Court, with whom *Messrs. Philip F. Herrick* and *James A. Murray* were on the brief, for intervenor.

Before EDGERTON, Chief Judge, and PRETTYMAN and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a petition to review an order of the Federal Power Commission. Petitioners claim to be shippers, purchasers or producers of natural gas. They attack that part of a Commission order which relieved the Montana-Dakota Utilities Company, a pipe-line firm, of any obligation to operate its gas transmission lines as a common carrier under terms of the Mineral Lands Leasing Act of 1920.[1] Montana-Dakota, which we shall call "Pipe Line", was allowed to intervene in opposition to the petition for review. Thereafter Pipe Line and the Commission moved to dismiss the petition, on the ground that petitioners were not parties aggrieved by the Commission's order.[2] Action on this motion was held in abeyance pending hearing and consideration of the case on the merits.

We turn first to the motion to dismiss. The extent to which the several petitioners participated in the proceedings before the Commission varies considerably. The most active was the Mondakota Gas Company. Consequently the status of Mondakota is the clearest, and we shall deal primarily with that petitioner.

Mondakota claims to be a producer and shipper of natural gas. In the proceedings before the Commission Mondakota filed applications in two of the dockets and was named by Pipe Line as defendant in another. It filed various papers and a brief but did not appear at the hearing except to request a postponement and, later, an adjournment. After the hearing Mondakota petitioned for a re-opening of the record and further hearing. The petition was denied on grounds that the issues were legal

[1] Sec. 28, 41 STAT. 449, as amended, 30 U.S.C.A. § 185.

[2] As required by Sec. 19(b) of the Natural Gas Act, 52 STAT. 831 (1938), 15 U.S.C.A. § 717r(b).

in nature and that no purpose would be served by additional proof.

Pipe Line and the Commission now urge that Mondakota is not aggrieved, because the record shows it has no present service contracts for use of Pipe Line's transmission facilities. Mondakota had such agreements in the past, they say, but assigned them, so that at the time of hearing they were held by the Industrial Gas Company, which is not a party to the petition for review. However the fact that Mondakota is not presently a formal party to such an agreement does not dispose of its claim that it is aggrieved by the Commission's order. The record throws little light upon Mondakota's interest in the service agreements held by Industrial Gas. But it does disclose that at least as late as July, 1954, Mondakota made payments owing from Industrial to Pipe Line and that Mondakota offered Pipe Line a bond to secure certain later payments. More important, in one of the dockets Pipe Line filed a complaint in which it charged Mondakota, among others, with violation of the Natural Gas Act. Testimony in support of this charge indicates that Mondakota had been active in soliciting retail customers of Pipe Line and, further, that as late as 1950 Mondakota's sole regular business was the shipping of gas over transmission facilities controlled by Pipe Line. It is noteworthy, in light of this testimony, that all parties apparently assumed Mondakota's interest in the proceedings before the Commission; indeed Pipe Line, while professing ignorance of the relationship between Mondakota and Industrial Gas, treated Mondakota at all times as having interests decidedly adverse to its own.

The Commission order of which review is sought terminates the obligation of Pipe Line to render common-carrier service. Pipe Line made clear to the Commission that if it were relieved of this obligation it would no longer ship gas in interstate commerce on the account of others. Thus the Commission's order effectively

denies this use of the Pipe Line facilities to Mondakota and others who might seek to employ them. Mondakota has used these facilities in the past in its own name; it has made payments for their later use by others; it has solicited users of gas with the obvious intention of using them further. Before now its interest has never been questioned. In view of this record we think it would be excessively technical to hold that Mondakota is not aggrieved by a Commission order that forecloses future use of Pipe Line's system by outsiders, solely because it was not the formal party to service agreements in effect at the time these proceedings were instituted. We conclude that Mondakota has a sufficient interest to obtain review. Thus we think it unnecessary to consider the status of the other petitioners. The motion to dismiss will therefore be denied.

The sole issue presented by the case on the merits is whether an amendment to Section 28 of the Mineral Lands Leasing Act[3] applies to pipe lines which were, at the time of the amendment, already subject to the common-carrier provisions of that section. Before amendment Section 28 read in pertinent part as follows:

> "Rights-of-way through the public lands * * * may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act [30 U.S.C.A. § 181], to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in

[3] 67 STAT. 557 (1953).

such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: * * *."

The amendment in question added to the foregoing a proviso as follows:

"That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality".

Petitioners' argument is that the amendment must be read as limited by the phrase "Rights-of-way through the public lands * * * may be granted". So read, they argue, the amendment applies only to natural gas pipe lines granted rights-of-way after August 12, 1953, the date on which the amendment was enacted. Thus their contention is that, because Section 28 as originally enacted covered only future grants, the amendment to that section also covers only future grants. To construe the amendment as applying to pipe lines already subject to the common-carrier restrictions is, they say, to give it retroactive effect.

We think the argument cannot be sustained. The 1953 amendment provides that pipe lines otherwise bound by the common-carrier provisions shall be exempt where they are operated by persons subject to specified public regulation. The exemption rests upon operation. According to the terms of the amendment, if the operation of the pipe line is subject to the regulation specified in the amendment, the common-carrier provisions do not apply. The amendment makes no reference to conditions in grants of rights-of-way; it refers directly to operation. It speaks in the present, referring to present operation. If Congress had

meant its exemption proviso to apply only to carriers thereafter securing rights-of-way, we think it would have cast its enactment in a different mold. It would have referred to conditions in grants. As it is, Congress said that pipe lines otherwise subject to the common-carrier provisions should be exempt where their operation is subject to certain regulation. Of course the common-carrier provisions are not requirements imposed initially, once and for all, like the payment of a fee; they are of continuing application. A pipe line that receives a grant is subject to the common-carrier provisions from the date of the grant. Thus, when it is exempted from those provisions, a current, present requirement is lifted. Such an exemption is plainly what Congress intended.

The amendatory proviso thus interpreted is not retroactive. It applies only to present and future operation and present and future regulation, drawing upon antecedent grants only as a condition for its present effect.[4]

If there were any doubt or ambiguity in the statute, the legislative history of the amendment would be dispositive. The report on the House bill[5] spoke of the incompatibility between the characteristics of a natural gas pipe line and its operaton as a common carrier. It indicated a belief that the common-carrier provisions of Section 28 restricted the capacity of the pipe lines to

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[4] See Reynolds v. United States, 292 U.S. 443, 449, 78 L. Ed. 1353, 54 S. Ct. 800 (1934); Cox v. Hart, 260 U.S. 427, 435, 67 L. Ed. 332, 43 S. Ct. 154 (1922); John McShain, Inc. v. District of Columbia, 92 U.S. App. D.C. 358, 205 F. 2d 882 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 900, 98 L. Ed. 400, 74 S. Ct. 227 (1953); Neild v. District of Columbia, 71 App. D.C. 306, 110 F. 2d 246 (D.C. Cir. 1940); Benjamin v. Hunter, 176 F. 2d 269 (10th Cir. 1949); Savorgnan v. United States, 171 F. 2d 155 (7th Cir. 1948), *aff'd*, 338 U.S. 491, 94 L. Ed. 287, 70 S. Ct. 292 (1950); M'Dougald v. New York Life Ins. Co., 146 Fed. 674 (9th Cir. 1906).

[5] H.R. Rep. No. 764, 83d Cong., 1st Sess. (1953).

serve public needs. Thus the object of the amendment was, as later explained by the House managers,[6] to "relieve" certain pipe lines from the common-carrier obligation. We think the language of the amendment clearly expresses this object and that petitioners' construction would substantially defeat the legislative intent.

Affirmed.

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[6] H.R. REP. No. 1032, 83d Cong., 1st Sess. (1953).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1956

No. 12759

MONDAKOTA GAS COMPANY, a Corporation, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*
MONTANA-DAKOTA UTILITIES COMPANY, *Intervenor*

On Petition for Review of an Order of the Federal Power Commission.

Before: Edgerton, Chief Judge, and Prettyman and Danaher, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said Federal Power Commission on review herein be, and the same is hereby, affirmed.

Dated: March 15, 1956.

Per CIRCUIT JUDGE PRETTYMAN.

No. 157

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, *Petitioners*

vs.

THE FEDERAL POWER COMMISSION, MONTANA-DAKOTA UTILITIES COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT IN OPPOSITION FOR MONTANA-DAKOTA UTILITIES COMPANY

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October Term, 1956

No. 157

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, *Petitioners*

vs.

THE FEDERAL POWER COMMISSION, MONTANA-DAKOTA UTILITIES COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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STATEMENT IN OPPOSITION FOR MONTANA-DAKOTA UTILITIES COMPANY

The Montana-Dakota Utilities Co. (the last word in the company's name is "Co.") concurs in and therefore adopts the arguments contained in the Brief in

Opposition for the Federal Power Commission, filed herein. It respectfully submits that the Petition for a Writ of Certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

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MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, PETITIONERS

v.

THE FEDERAL POWER COMMISSION, AND MONTANA-DAKOTA UTILITIES COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the presiding examiner (R. 14-26) and the order of the Federal Power Commission affirming his decision (R. 34) are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-7a) is reported at 232 F. 2d 358.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1956 (Pet. App. 8a). The petition for a writ of certiorari was filed on June 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Prior to amendment in 1953, Section 28 of the Mineral Leasing Act, 41 Stat. 449, 30 U.S.C. 185, read in pertinent part:

> Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line, and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable, * * *.

The provision added to Section 28 of the Mineral Leasing Act by amendment in 1953, 67 Stat. 557, reads as follows:

That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: * * *.

QUESTION PRESENTED

Montana-Dakota Utilities Company, a natural gas company subject to regulation under the Natural Gas Act, had been granted rights-of-way over public lands for its pipelines. Prior to its amendment in 1953, Section 28 of the Mineral Leasing Act conditioned such grants on the requirement that the pipeline be operated as a common carrier. The question presented is whether the 1953 amendment to Section 28 operated to relieve Montana-Dakota of the obligation to serve as a common carrier.

STATEMENT

The Montana-Dakota Utilities Company (Montana-Dakota), a natural gas company subject to regulation under the Natural Gas Act, operates an integrated natural gas pipeline system in the states of Wyoming, Montana, North Dakota, and South Dakota, producing, purchasing, transporting, and selling natural gas in interstate commerce for resale. A part of its pipeline system runs through public lands, its principal lines in Montana, North Dakota, and South Dakota having been built under rights-of-way granted by the Secretary of the Interior upon the condition that the lines be operated as a common carrier under Section 28 of the Mineral Leasing Act, 41 Stat. 449, as amended, 30 U.S.C. 185,

supra, p. 2 (see Pet. 4, n. 1; R. 13). In a series of applications and complaints filed with the Federal Power Commission between July 23, 1953, and November 15, 1954, Montana-Dakota claimed to be relieved of its obligations as a common carrier of natural gas by virtue of the 1953 amendment to Section 28, *supra*, pp. 2-3 (R. 14-16).[1]

The Commission consolidated these proceedings and held hearings (R. 17). The presiding examiner held that Montana-Dakota had been relieved of its common carrier obligations by the 1953 amendment to Section 28 because that amendment applied to all pipelines operated by persons subject to regulation under the Natural Gas Act, irrespective of the date on which the rights-of-way were granted. Accordingly, the examiner, subject to Commission approval, dismissed or terminated the various applications, all of which depended on Montana-Dakota's duty to act as a common carrier (R. 14-26). The Commission affirmed that decision (R. 34).

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[1] Montana-Dakota filed three applications to suspend transportation service for certain companies over its pipeline system because of non-payment for past services; a gas tariff which would have substituted contract service in lieu of common carrier service; and a complaint against Mondakota Gas Company and others, alleging that the transportation of gas for those companies was in violation of Section 7(c) of the Natural Gas Act (52 Stat. 824, as amended, 15 U.S.C. 717f(c)). Each of these five proceedings was determined by the Commission's order holding Montana-Dakota to have been relieved of its common carrier obligations, as was an application by Mondakota Gas Company and Industrial Gas Company for a determination of the reasonableness of Montana-Dakota's gas tariff (R. 25). An application by Mondakota Gas Company for a certificate of public convenience and necessity authorizing it to sell natural gas to the Eastern Clay Products Company was dismissed for lack of jurisdiction since the proposed sale was not a sale for resale and was not, therefore, subject to the provisions of the Natural Gas Act (R. 25).

Petitioners, all of whom had appeared before the Commission, sought review of the Commission's order in the court below.[2] Affirming the Commission's order, the Court of Appeals rejected petitioners' contention that the 1953 amendment was intended to apply only to pipelines granted rights-of-way after its enactment. It concluded, contrariwise, that the exemption applies to the future operation of regulated pipelines and that it makes no difference whatever whether the pipelines were constructed on rights-of-way granted before or after the date of the amendment.

ARGUMENT

1. Prior to 1953, Section 28 of the Mineral Leasing Act (41 Stat. 449, as amended, 30 U.S.C. 185) required that rights-of-way for gas or oil pipelines across public lands be granted only "upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers * * *." In 1953, Congress amended this section by adding the proviso that (67 Stat. 557):

> * * * the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality * * *.

[2] In the Court of Appeals, the Commission and Montana-Dakota questioned the standing of petitioners to seek review, pointing out that none of them had present contracts with Montana-Dakota. The Court of Appeals ruled, however, that Mondakota Gas Company was a party aggrieved by the order (Pet. App. 3a-4a). In this brief in opposition, we confine ourselves to the merits.

As the court below held (Pet. App. 5a), the exemption depends solely upon a single fact: Whether the *operation* of the pipeline is contemporaneously subject to a specified form of regulation. If the operator is subject to such regulation, its pipeline is within the 1953 amendment and removed from Section 28's requirement to provide service as a common carrier. Since Montana-Dakota is concededly subject to regulation under the Natural Gas Act (Pet. 4), the holding that it is not subject to the common carrier provisions of the Mineral Leasing Act is clearly correct.

Contrary to petitioner's position (Pet. 11-12), nothing in the language of the amendment restricts its effect to pipelines thereafter granted rights-of-way over public lands. The amendment, in terms, exempts from "the common carrier provisions of this section" all regulated pipelines otherwise subject to those provisions. Despite the fact that the common carrier obligations are imposed as conditions of grants of rights-of-ways, these obligations, as emphasized by the court below, "are not requirements imposed initially, once and for all, like the payment of a fee; they are of continuing application" (Pet. App. 6a). They represent, as to each pipeline concerned, "a current, present requirement" (*ibid.*), and accordingly, the amendment cancelling their effect relieves each such pipeline of its common carrier obligations without regard to when it received its grant.

2. The 1953 amendment is not ambiguous. If it were, however, any doubt as to the correctness of the Court of Appeals' decision would be dispelled by the legislative history. It plainly appears that the amendment was adopted because Congress was of the view that, in

the natural gas field, common carrier obligations are inconsistent with those of a regulated utility. Thus, the House Interior and Insular Affairs Committee stated (H. Rep. 764, 83d Cong., 1st Sess., pp. 1-2):

> The inherent operating characteristics of a natural gas pipeline are incompatible with its operation as a common carrier. It is designed and operated to provide a continuous fuel service to its customers and not for the purpose of providing transportation service to others. If such a pipeline is compelled to furnish common-carrier service it is inevitable that its capacity to serve the public as a public utility will be impaired since it will be required to perform services in addition to and different from those for which it has been certificated.

Similarly, the Senate Interior and Insular Affairs Committee declared (Sen. Rep. 578, 83rd Cong., 1st Sess., pp. 1-2) that

> A natural-gas pipeline is designed and operated to provide a continuous fuel service to its customers and not for the purpose of providing transportation service to others. For example, a given pipeline may not have sufficient capacity to provide common-carrier service to the public.

The incompatibility thus noted in both houses has nothing to do with the date when a pipeline receives a right-of-way across Government lands. It exists for all. And it was the unmistakable purpose of Congress that the exemption should apply to all.[3]

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[3] The applicability of the amendment to pipelines with rights-of-way granted prior to the date of the amendment was clearly as-

Further demonstrating the congressional purpose to exempt all natural gas pipelines subject to rate regulation from Section 28's common carrier requirement is the ultimate rejection of an amendment, originally passed by the House, which would have continued the common carrier obligations with respect to gas produced upon Government lands in the vicinity of the pipeline and would have empowered the Federal Power Commission, upon the application of a producer of natural gas, to require a pipeline to transport or purchase the gas of that producer (see R. 19). This amendment was rejected by the Senate, and the Conference Report recommended that the House recede therefrom because of an agreement by the conferees that the amendment "would render ineffective the preceding clause, and perhaps nullify it." The Conference Committee re-emphasized that "the object of the legislation is to *relieve* certain pipelines used by regulated utilities from the common-carrier obligation for reasons conceded to be reasonable and just." (Emphasis added.) H. R. Rep. 1032, 83rd Cong., 1st Sess., p. 2.

3. Petitioners stress the rule of construction that a statute will not be presumed to have retroactive application unless a contrary intention is clearly indicated (Pet. 11). But assuming for the moment that the construction adopted by the Commission and the court below involved a retroactive application, the rule cited, which is only an aid in construction, would not govern, for, as we have shown, the statutory language and history manifest a purpose to cover, uniformly and even-

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sumed by both Committees in their reference to the Secretary of Interior's difficulties, culminating in *El Paso Natural Gas Company v. Chapman*, 204 F. 2d 46 (C.A.D.C.), in seeking to make Section 28 effective in regard to natural gas pipelines.

handedly, all pipelines, whatever their birth dates, which are subject to regulation under the Natural Gas Act. Moreover, as the court below recognized (Pet. App. 6a), retroactivity is not in fact involved. No legal relationship arising out of Montana-Dakota's required operation as a common carrier prior to the date of the amendment is disturbed; only the *future* operation of Montana-Dakota has been changed and only the inchoate expectations of petitioners have been affected.[4] Petitioners have no vested right that persons whose services they might wish to patronize be charged by Congress with particular obligations or be regulated in a particular fashion.

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[4] The fact that the amendment as here applied is not retroactive in the sense that the courts have used that term is shown by a comparison of the circumstances here and those in the cases upon which petitioners rely (Pet. p. 11): *United States* v. *Heth*, 3 Cranch 399 (Act reducing the fee of a customs collector on imported goods held inapplicable to goods imported and bonded before the effective date of the act); *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry.*, 266 U.S. 435 (extension of a statute of limitations during wartime held inapplicable to actions in which limitations had run prior to the date of the extending act); *Shwab* v. *Doyle*, 258 U.S. 529 (Act imposing an estate tax upon gifts made in contemplation of death held inapplicable to gifts made before enactment). In contrast to the expectations of petitioners, in each of these three cases the legal relationships involved had become fixed and definite at the time of the enactment of the statutes under attack.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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